Oklahoma Fixture Company *and* United Brotherhood of Carpenters and Joiners of America, Local Union No. 943, AFL–CIO. Cases 17–CA–18734 and 17–CA–19036

August 25, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND HURTGEN

On August 14, 1997, Administrative Law Judge Pargen Robertson issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the administrative law judge's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order, and to adopt the judge's recommended Order as modified and set forth in full below.

We find, contrary to the judge and our dissenting colleague, that the Respondent did not fail to bargain in good faith in violation of Section 8(a)(5) and (1) of the Act during negotiations for a successor collective-bargaining agreement covering a unit of employees known as the "outside" unit. Rather, we find that the Respondent utilized lawful bargaining pressure in an effort to secure from the Union an agreement that met its express goal in the negotiations, i.e., the elimination of the contractual requirement to hire employees through the Union's hiring hall. The judge further found, and we agree for the reasons set forth below, that the Respondent violated Section 8(a)(5) and (1) of the Act by ceasing to deduct permit fees from employees' pay and by ceasing to remit those sums to the Union, with respect to another unit of employees known as the "inside" unit.

The Negotiations for a Successor Collective-Bargaining Agreement for the "Outside" Unit

Through a series of bargaining meetings, telephone discussions, and the exchange of written proposals, the Respondent and the Union conducted negotiations for a collective-bargaining agreement to replace the agreement expiring on May 31, 1995.[1] At the parties' first meeting on August 15, the Union presented a proposed agreement that included, inter alia, a substantial wage increase. At the next meeting on September 28, the Respondent submitted a counterproposal that called for a 19-percent reduction in wages; the elimination of health and welfare, pension and apprenticeship fund contributions; the elimination of the union-security and hiring hall provisions; and a contract duration of 1 rather than 3 years.

The Union responded to the Respondent's counterproposal by mail on October 4. The new union proposal called for wage increases of 4.5, 2.7, and 3.1 percent, respectively, in the 3 years of the contract, and increased the number of apprentices that could be supervised by a single foreman. The Respondent, on November 10, informed the Union that it would accept the Union's proposed wage increase if the requirement to staff projects through the hiring hall were eliminated. The Respondent explained that it feared that the Union could not provide sufficient labor for future projects.

The Union did not accept the Respondent's proposal. Instead, on December 12 it proposed that the Respondent have the option of staffing up to 40 percent of a project through its own hiring, and that the new contract retain the current provision authorizing the Respondent to hire on its own if the Union did not furnish sufficient referrals within 24 hours. On February 7, 1996, the Respondent submitted a proposal permitting it to staff up to 70 percent of a project through its own hiring; accepting the Union's proposed wage increases; and maintaining current benefit fund contributions.

When the parties met on March 5, 1996, the Respondent informed the Union that it would accept the Union's initial proposal of August 15, provided that the hiring hall requirement not pertain to jobs performed for Dillards' stores. The Respondent expressed its concern that the Union could not supply the labor needed for these projects, and explained that Dillards had stated that it would not agree to have fixture work performed under union contracts. The Union, believing that the Dillards' projects represented a large portion of the unit work, did not accept that proposal, and the Respondent later withdrew it.[2]

On May 28, 1996, the Union proposed a procedure by which the parties would meet in advance to discuss projects requiring more than 10 employees and, if the Union were unable to refer a sufficient number of employees within 48 hours of the meeting, the Respondent would be free to fill the remaining positions through other means. This proposal was submitted in writing on May 31, 1996.

When the parties met next on July 19, 1996, the Respondent submitted a counterproposal providing for a 1-year agreement effective as of May 31, 1996; leaving the use of the hiring hall to the Respondent's discretion; and eliminating the access and union-security provisions included in the expired contract. On July 23, 1996, the Union asked the Respondent whether another meeting would be beneficial, and the Respondent indicated that it did not think so. The Union made no subsequent requests for bargaining with the Respondent.

[1] All dates are 1995 unless otherwise indicated.

[2] On March 13, 1996, the Union filed an unfair labor practice charge against the Respondent regarding the proposal to exclude the Dillards' work from the hiring hall; however, the charge was subsequently withdrawn based on the Union's understanding that the Respondent would withdraw its proposal concerning the Dillards' work.

The complaint alleges that the Respondent's July 19, 1996 proposal was onerous and calculated to frustrate the Union so as to constitute bad-faith bargaining. Contrary to the judge and our dissenting colleague, we do not find that the record supports such a conclusion. Rather, we find that the evidence shows only that the Respondent engaged in lawful hard bargaining in an attempt to achieve a collective-bargaining agreement with the Union that would be favorable to its objectives.

Applicable Legal Principles

Section 8(d) of the Act defines the nature and extent of the obligation to bargain. That section provides:

> [T]o bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession.

The good-faith bargaining requirement, included in the Wagner Act through 8(5) prohibition against refusing to bargain, demands that parties approach negotiations with "a sincere purpose to find a basis of agreement."[3] Section 8(d) was added in the Taft-Hartley amendments, however, as a result of Congressional concern that the Board had "gone very far, in the guise of determining whether or not employers had bargained in good faith, in setting itself up as the judge of what concessions an employer must make and of the proposals and counterproposals that he may or may not make." *NLRB v. American National Insurance Co.*, 343 U.S. 395, 403 (1952), citing H.R. Rep. No. 245, 80th Cong., 1st Sess. 19 (1947). In accordance with Section 8(d), therefore, "the Board may not**,** either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements."[4]

In *H. K. Porter v. NLRB*, 397 U.S. 99 (1970), the Supreme Court again emphasized the strict limitations on the Board's role in assessing the bargaining between employers and unions. Citing assurances in the legislative history that the Act neither required an employer to sign any agreement with any union, nor permitted the Government to regulate the wages, hours, or working conditions at any place of employment,[5] the Court held that the Board lacked authority to order agreement as to substantive contract provisions. In the words of the Court:

> [A]llowing the Board to compel agreement when the parties themselves are unable to agree would violate the fundamental premise on which the Act is based—private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract.[6]

The Court acknowledged that some parties might not reach agreement through bargaining at all, and might need to resort to economic weapons.[7]

In determining whether a party has violated its statutory duty to bargain in good faith, the Board examines the totality of the party's conduct, both at and away from the bargaining table.[8] Thus, "[f]rom the context of an employer's total conduct, it must be decided whether the employer is lawfully engaging in hard bargaining to achieve a contract that it considers desirable or is unlawfully endeavoring to frustrate the possibility of arriving at any agreement."[9] Conduct relevant to the issue of good-faith bargaining includes, inter alia, delaying tactics, unreasonable bargaining demands,[10] unilateral changes in mandatory subjects of bargaining, efforts to bypass the union through direct dealings with employees, failure to designate an agent with sufficient bargaining authority, withdrawal of already agreed-upon provisions, arbitrary scheduling of meetings, and refusal to provide information requested by the union.[11] Each of these actions, in the circumstances of a particular case, might be insufficient to demonstrate a breach of the duty to bargain in good faith.[12] Cumulatively, however, a pattern of such conduct may show an intent not to reach an agreement in the circumstances of a particular case.

The Board, consistent with *American National Insurance* and *H. K. Porter*, discussed supra, declines to make subjective determinations regarding the content of bargaining proposals, including whether the proposals are acceptable or unacceptable to the other party.[13] Instead, the Board examines proposals only for the purpose of evaluating whether they were "clearly designed to frustrate agreement on a collective-bargaining contract."[14]

With respect specifically to the withdrawal of bargaining proposals and tentative agreements, the Board has

[3] *Atlanta Hilton & Tower*, 271 NLRB 1600 (1984), quoting *NLRB v. Herman Sausage Co.*, 275 F.2d 229, 231 (5th Cir. 1960).

[4] *American National Insurance*, 343 U.S. at 404. In fact, the Court noted that the Act "does not compel any agreement whatsoever between employees and employers." Id. at 402.

[5] Id. at 104.

[6] Id. at 108.

[7] Id. at 109.

[8] *Atlanta Hilton & Towers*, 271 NLRB at 1603.

[9] Id., quoting from *West Coast Casket Co.*, 192 NLRB 624, 636 (1971), enfd. in relevant part 469 F.2d 871 (9th Cir. 1972).

[10] Member Hurtgen cautions that the Board must refrain from evaluating the "reasonableness" of a given proposal in bargaining. However, he agrees that other evidence may suggest that a given proposal is designed to frustrate bargaining and the prospects for agreement.

[11] Id.; *Radisson Plaza Minneapolis*, 307 NLRB 94 (1992), enfd. 987 F.2d 1376 (8th Cir. 1993); *Seattle-First National Bank v. NLRB*, 638 F.2d 1221 (9th Cir. 1981); and *Golden Eagle Spotting Co. v. Brewery Drivers & Helpers Local 133*, 93 F.3d 468, 470–471 (8th Cir. 1996), enfg. 319 NLRB 64 (1995).

[12] *NLRB v. Pacific Grinding Wheel Co.*, 572 F.2d 1343, 1349 (9th Cir. 1978), enfg. 220 NLRB 1389 (1975).

[13] *Reichhold Chemicals*, 288 NLRB 69 (1988).

[14] Id.

followed the standard articulated by the Eleventh Circuit in *Mead Corp. v. NLRB*, 697 F.2d 1013, 1021 (1983). In *Mead*, the court recognized that the employer's conduct must be considered in light of all the circumstances, adding:

> The withdrawal of previous proposals or tentative agreements does not in and of itself establish the absence of good faith. [Citation omitted.] However, withdrawal of a proposal by an employer without good cause is evidence of a lack of good faith bargaining by the employer in violation of Section 8(a)(5) where the proposal has been tentatively agreed upon or acceptance by the Union appears to be imminent. [Id. at 1022.]

Relying on *Mead*, the Board found in *Driftwood Convalescent Hospital*, 312 NLRB 247 (1993), that the employer bargained in bad faith with the intent of obstructing bargaining when it withdrew from tentative agreements reached with the union and provided no explanation for its action to the union or the Board. The Board also found that, based on the totality of the circumstances and particularly in the context of the employer's reneging on the parties' tentative agreements, the employer also engaged in bad-faith bargaining by its unexplained withdrawal of other proposals and substitution of regressive proposals.[15]

In contrast, the Board in *White Cap*, *Inc.,* 325 NLRB 1166, 1167 (1998), enfd. 206 F.3d 22 (D.C. Cir. 2000), found that the employer complied with its bargaining obligation when it withdrew portions of its proposal, to which the union had tentatively agreed, after the employees failed to ratify the proposal by the deadline specified by the employer.[16] In enforcing the Board's decision, the D.C. Circuit found that the employer, which had offered favorable terms in order to obtain timely agreement concerning the implementation of a new work schedule, had good cause for withdrawing from its tentative agreements when timely ratification did not occur.[17]

In some cases, the Board in finding bad faith has noted, among other things, that the employer provided no explanation for its withdrawal of bargaining proposals and substitution of regressive proposals. For example, in *Central Management Co.*, 314 NLRB 763 (1994), the Board found that the totality of the circumstances demonstrated bad faith where the employer solicited employees to abandon the union, bypassed the union by making direct offers to employees in exchange for their abandonment of the union, failed to timely furnish information to the union, threatened a striker with physical harm, unilaterally ceased benefit fund contributions on behalf of employees, and replaced its 5 bargaining proposals with 43 proposals. The change in proposals was explained only by the negotiator's testimony that he "had to go back and make up additional proposals, which I hoped later on I could trade off to some concessions by the union."[18]

However, the Board has found it immaterial whether the union, the General Counsel, or the administrative law judge found the asserted reasons for making the regressive proposals totally persuasive. "What is important is whether they are 'so illogical' as to warrant the conclusion that the Respondent by offering them demonstrated an intent to frustrate the bargaining process and thereby preclude the reaching of any agreement."[19]

Discussion

Applying this precedent, we find that the record in this proceeding does not support a conclusion that the Respondent bargained in bad faith by submitting its July 19, 1996 proposal to the Union. Bad-faith bargaining allegations, as discussed above, must be evaluated based on the totality of conduct, both at and away from the bargaining table. With respect to actual negotiations, the collective-bargaining process must be viewed as a whole, not by isolating single elements of it for scrutiny. Thus, regardless of whether one would find that the Union's proposals were more reasonable than the Respondent's or that the Union demonstrated a greater willingness to compromise, neither of these considerations would warrant a finding of a violation under the Act. Nor, in our view, does the totality of the Respondent's conduct in this case.

The Respondent took the position early in the parties' negotiations that it wanted to eliminate the necessity to obtain employees through the Union's hiring hall. Adhering to that position as negotiations progressed, the Respondent explained that it feared the Union could not furnish a sufficient number of employees for upcoming projects. According to the uncontradicted testimony of Ronnie Line, the Respondent's president, the Union had repeatedly been unable to supply adequate labor to the Respondent for past projects. Thus, although the Respondent's bargaining position on this issue would eliminate a common union role, it also reflects a valid employer interest. Furthermore, the Respondent's position is not more restrictive than the positions regarding management-rights clauses and union-security provisions asserted in other cases in which no bad-faith bargaining was found.[20]

[15] See also *Homestead Nursing Center*, 310 NLRB 678 (1993) (employer bargained in bad faith by withdrawing from tentative agreements without good cause).

[16] In *White Cap*, the Board did not pass on the continued viability of the standard applied in *Driftwood*. Because the present case does not involve tentative agreements or the imminent acceptance of proposals by the Union, we find it unnecessary to pass on the *Driftwood* standard here.

[17] 206 F.3d at 32.

[18] 314 NLRB at 771. See also *Pacific Grinding Wheel*, supra.

[19] *Barry-Wehmiller Co.*, 271 NLRB 471, 473 (1984), quoting *Hickinbotham Bros. Ltd.*, 254 NLRB 96, 103 (1981).

[20] See, e.g., *American National Insurance*, 343 U.S. at 398, 407–408 (broad management-rights proposal); *H. K. Porter,* 397 U.S. at 101 (employer refusal to agree to dues checkoff on ground that it was not

The Respondent, moreover, demonstrated a willingness to make concessions in order to achieve this bargaining objective. The Respondent's initial proposal included the elimination of the hiring hall and union-security provisions of the expiring agreement, as well as the health and welfare, pension, and apprentice fund benefits, and a reduction in wages. On November 10, however, the Respondent offered to provide the wage increases proposed by the Union, in exchange for the elimination of the hiring hall requirement. Under this proposal, the Respondent would also apply the union-security requirements to employees who worked for more than 7 days. The Respondent also subsequently offered to hire 30 percent of the employees for each project through the hiring hall, to accept the Union's proposal on wages, and to maintain current benefit programs.[21] The Union rejected these concessions, as was its prerogative, and offered its own proposals, which were unacceptable to the Respondent.

In its last proposal on July 19, 1996, with its attempts at reaching an acceptable agreement regarding the hiring hall unsuccessful, the Respondent returned to its original position of eliminating both the hiring hall and union-security provisions, and further deleted the provision for union access. Nothing in the record suggests that the Respondent's last proposal was designed to avoid an agreement with the Union. Rather, the facts indicate that the Respondent returned to its earlier stance in order to emphasize its resolve concerning the hiring hall issue and to refocus the negotiations on that matter so that an agreement would ultimately be possible.

There is no evidence establishing that the parties had reached tentative agreements on union-security, access, or any other issues, or were close to reaching an overall agreement. In fact, the parties' exchange of comprehensive proposals in the form of complete contracts indicates that all issues remained on the table, even though some provisions varied little or not at all. The parties' proposals reflected the typical bargaining pattern of concessions in one area in return for more favorable terms in another. Significantly, the Union had rejected the Respondent's previous proposal. Under these circumstances, the Board cannot effectively preclude the Respondent from modifying or withdrawing specific portions of its rejected proposal, by concluding that withdrawal of proposed concessions constitutes bad-faith bargaining.[22] Such a determination is tantamount to compelling concessions and regulating the content of the parties' agreement, powers clearly beyond the statutory authority of the Board.[23]

In addition, we do not agree with our dissenting colleague that the Respondent has demonstrated bad faith by failing to provide an explanation for the changes encompassed in its July 19 proposal. We find that the Respondent adequately supplied an explanation for the changes in its July 19 final proposal.[24] The letter accompanying that proposal states clearly that the main area of concern continued to be the hiring hall requirement, the principal issue of concern to the Respondent throughout the negotiations. Although the Respondent's brief cover letter did not spell out that it withdrew its earlier proposal on union access or returned to its original proposal on union security in support of its hiring hall position, its brevity does not provide a basis for inferring bad faith, particularly where it clearly pinpointed the central issue and where, as noted, the previous proposal had been rejected by the Union.[25]

Nor do we agree with the dissent's assertion that, by expressing an unwillingness to continue to use the hiring hall as the "sole source" of its labor, the Respondent presented an inaccurate explanation for the changes in its final proposal that cast doubt on its good faith. It is undisputed that the Union had proposed procedures that would allow the Respondent to hire from other sources under certain circumstances, and that the expired contract also permitted some outside hiring. The record is equally clear, however, that the Union's hiring hall had been the required primary or initial source of employees, and that the Respondent was intent on securing relief from that requirement. Thus, we do not find that the Respondent's mere use of the term "sole source" with respect to the hiring hall constitutes evidence of bad faith.

Finally, our dissenting colleague asserts that the Respondent also demonstrated bad faith when the Union's counsel, Birmingham, telephoned the Respondent's counsel, Andrew, upon receiving the July 19, 1996 proposal. Birmingham asked whether there would be any benefit in having another meeting, and Andrew answered that "he didn't think so." Although the dissent concludes from this response that the Respondent was unwilling to

going to aid the union); *Reichhold Chemicals*, 288 NLRB at 70 (broad management-rights clause, narrow grievance definition, and comprehensive no-strike clause); *National Steel & Shipbuilding Co.*, 324 NLRB 1031, 1042 (1997) (employer proposal allowing individual employees to choose whether union membership will be a condition of their employment).

[21] As noted above, the Respondent also proposed that only jobs performed for Dillards, which often required a large number of employees, be excluded from the hiring hall requirement, but the Respondent withdrew the proposal after the Union objected and filed an unfair labor practice charge.

[22] *Golden Eagle Spotting Co.*, 93 F.3d at 471.

[23] *H. K. Porter*, supra.

[24] In view of our finding that an adequate explanation was given, we find it unnecessary to address in this case whether the law required an explanation in the instant circumstances.

[25] Cf. *Central Management*, 314 NLRB at 771. There, among the factors considered in determining that the employer bargained in bad faith was its refusal to identify the real issues to the union. See also *Hyatt Regency Memphis*, 296 NLRB 289, 314 (1989), in which the Board found that the "reduction of a proposal is also not indicative of bad faith where . . . the rejection of the earlier proposal by the Union was likely." In the present case, the Union had already rejected the Respondent's prior proposal.

continue bargaining, we do not agree. Initially, we note that the complaint does not allege that this exchange constituted a refusal to bargain by the Respondent. Further, the Union never actually requested to meet, and the Respondent's response did not indicate that such a request would have been futile, i.e., that the Respondent would have *refused* to meet and bargain in good faith. Nor does the record otherwise suggest that the Respondent was unwilling to negotiate further with the Union. As the dissent acknowledges, the Respondent did not declare impasse, and the record does not indicate that the Respondent implemented its proposal. Further, Birmingham testified that the Union made no subsequent effort to continue bargaining, but rather filed the charge in the instant proceeding.

In sum, we find that the totality of the circumstances in this proceeding does not demonstrate that the Respondent acted to evade its statutory obligation to bargain with the Union. The Respondent was not bound to retain or improve upon its proposed concessions to the Union, which had been rejected. The record, moreover, is devoid of other contemporaneous conduct by the Respondent indicative of bad faith, such as unilateral changes in working conditions or direct dealing with employees in disregard of the Union's representative status. Therefore, the only basis for the alleged violation is a view that the Respondent was harsh both in the content of its proposals and its hard bargaining in support of them. Section 8(d) of the Act, as contemplated by Congress and interpreted by the Supreme Court, clearly withholds from the Board the authority to find unlawful conduct on this basis.

Accordingly, we dismiss the complaint allegation that the Respondent violated Section 8(a)(5) and (1) of the Act during negotiations for a successor collective-bargaining agreement covering the "outside" unit.

The Permit Fee Issue

For the following reasons, we adopt the judge's finding that the Respondent violated Section 8(a)(5) and (1) of the Act by ceasing to deduct permit fees from employees' pay and by ceasing to remit those sums to the Union. This issue involves a different unit of employees known as the "inside" unit. The parties' most recent collective-bargaining agreement covering this unit, effective from December 1, 1994, to November 30, 1997, contains the following dues-checkoff provision:

> The Company agrees to deduct from the pay of all employees covered by this Agreement the dues of the Union and agrees to remit to the Union all such deductions, provided that the Union delivers to the Company a written authorization, signed by each employee to whom this provision applies, irrevocable for one year or the expiration of this Agreement, whichever occurs sooner.

The Union has established a "permit fee" to be paid by new employees in the "inside" unit during the second and third months of their employment. The permit fee is equal in amount to the dues the Union charges its members.[26] In 1989, the Respondent began the practice of deducting permit fees from the paychecks of "inside" unit employees who had signed checkoff authorization forms and forwarding these fees to the Union.[27] In February 1997, however, the Respondent, without notice to the Union, ceased its practice of deducting and remitting permit fees.

It is well established that an "employer's established past practice can become an implied term of a collective bargaining agreement." *Bonnell/Tredegar Industries v. NLRB*, 46 F.3d 339, 344 (4th Cir. 1995). Furthermore, "such implied terms cannot be changed without the parties' mutual consent." Id. Here, although the parties' contract speaks in terms of deducting and remitting "the dues" of the Union, the Respondent has a longtime practice of also deducting and remitting the Union's "permit fees." Accordingly, we agree with the judge that this established practice ripened into an implied term that the Respondent could not modify without the Union's consent.

The Respondent does not dispute that it failed to obtain the consent of the Union before discontinuing the deduction and remission of the permit fees. Rather, the Respondent argued below and in its exceptions that its conduct was lawful because the remittance of such permit fees is proscribed by Section 302 of the Labor Management Relations Act. Section 302 generally prohibits employers from making payments to labor organizations except in certain specified circumstances. Section 302(c)(4), however, excepts from this general rule payments

> with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided*, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year.

As the judge found, it is undisputed that the 30–90 day probationary employees voluntarily executed authorizations for the Respondent to withhold "an amount equal to the . . . dues established by the Union," even though those probationary employees were not yet eligible for union membership. The permit fees that the Respondent was deducting from these employees' paychecks in fact

[26] Employees become eligible for union membership on their 91st day of employment, following a 90-day probationary period.

[27] The "Authorization for Deduction of Initiation Fees, Dues, Etc." form states in pertinent part as follows:

> I hereby authorize my Employer or his successor to deduct from my regular wages an amount equal to the initiation fee and dues established by the Union and to remit such amounts to the [Union] in the manner specified by my bargaining agent recognized in the applicable Collective Bargaining Agreement.

represent "an amount equal to . . . the dues established by the Union." The Respondent submits, however, that the permit fees do not constitute "membership" dues within the meaning of Section 302(c)(4), because they are deducted from employees prior to the time that they become members on their 91st day of employment. The judge rejected the Respondent's contention, stating that "the NLRB has recognized that an employer may deduct fees from employees that are not union members and remit those funds to the union," citing *Rochester Mfg. Co*., 323 NLRB 260 (1997), and *California Saw & Knife Works*, 320 NLRB 224 (1995), enfd. sub nom. *Machinists v. NLRB*, 133 F.3d 1012 (7th Cir. 1998), cert. denied sub nom. *Strang v. NLRB*, 119 S.Ct. 47 (1998). In its brief, the Respondent argues that the cases cited by the judge are distinguishable, because they involve the deduction of fees from employees "who are not full-fledged members but are required by a union security clause to meet the 'financial core obligations' of membership," while the permit fee in issue here "is collected only from employees who are *not* union members in any sense of the word and are not required by the contract to be members." (Emphasis in original.)

As the Respondent recognizes, the Department of Justice, the agency responsible for the enforcement of Section 302, issued an influential opinion in 1948 construing the term "membership dues" in Section 302(c)(4) as including "initiation fees" and "assessments."[28] This construction of Section 302 was followed by the Board in *Wm. Wolf Bakery*, *Inc.,* 122 NLRB 630 (1958). The issue presented in *Wolf* was whether a checkoff provision in a collective-bargaining agreement was illegal under Section 302 because it required the checkoff of "dues, initiation fees, etc." In *Wolf*, the Board initially issued a decision finding that a provision for checkoff of moneys other than dues exceeded the "membership dues" limitation of Section 302(c)(4). Upon reconsideration, however, the Board reversed itself, and deferring to the interpretation given "membership dues" by the Department of Justice, held that that term as used in Section 302 was broad enough "to include initiation fees and assessments." 122 NLRB at 631.

Three years later, in *Florence Brooks*, 131 NLRB 756, 770–773 (1961), enfd. as modified sub nom. *NLRB v. Food Fair Stores*, 307 F.2d 3 (3d Cir. 1962), the Board construed "membership dues" in Section 302 more broadly than "periodic dues" in Section 8(a)(3). Thus, the Board held in *Florence Brooks* that while the term "membership dues" covers "assessments," the term "periodic dues" does not.

The court of appeals agreed with the distinction drawn by the Board, reasoning as follows:

> In [acquiescing] in the interpretation by the Department of Justice of Section 302 for the purpose of its administration of that statute in its penal aspects the Board did not bind itself to a similar construction in the administration of Sections 8(a)(3) and 8(b)(2). Two different policies are brought into play, the operative effects of which create no conflict. Section 8(a)(3) prevents a union shop employer from discharging an employee at the request of the union unless he has reason to believe that only failure to pay uniform "periodic dues" or "initiation fees" is the sole cause of his lack of union membership, while Section 302, under the interpretation of the Department of Justice, permits an employer with a valid union security contract to deduct assessments, providing the employee has voluntarily signed an authorization as prescribed in the section. The broad construction granted in the administration of Section 302 by the Department of Justice is consistent with the criminal character of the sanction it embodies. The narrow construction applied by the Board to the enforcement of Sections 8(a)(3) and 8(b)(2) is consistent with the overall protection afforded by those sections to employees and equally creates no inconsistency with the enforcement of Section 302 for it is completely extrinsic thereto. [307 F.2d at 12.]

The instant case does not present the question whether the Union's "permit fees" fall within the narrow classification of "periodic dues." Rather, the issue before us is whether the "permit fees" fall within the broader classification of "membership dues." In order to resolve that issue, we turn for guidance to two court decisions interpreting Section 302 consistent with the Justice Department's 1948 opinion.

In *Mine Workers Local 515 v. American Smelting Co*., 311 F.2d 656 (9th Cir. 1963), the Ninth Circuit reversed the District Court and held that "membership dues" as used in Section 302(c)(4) included a special strike assessment. The court agreed with the broad construction given that statutory term by the Justice Department's opinion and the Third Circuit's *Food Fair* decision.

American Smelting was cited with approval by the Second Circuit in *Schwartz v. Musicians Local 802*, 340

[28] This opinion, reported at 22 LRRM 46 (1948), reads in pertinent part as follows:

> Does the term "membership dues" in Section 302(c) include initiation fees and assessments as well as regular periodic dues, particularly where the union constitution provides that such fees and assessments are included in the term "membership dues"?
>
> This identical question was presented to the Criminal Division as the result of the National Bituminous Coal Wage Agreement of the 1947 which contained a provision for the checkoff of membership dues, including initiation fees and assessments of the United Mine Workers of America and its various subdivisions, as authorized and approved by the International Union, UMWA. In a memorandum dated July 10, 1947, we furnished the Attorney General with our view on this question, stating that initiation fees and assessments, being incidents of membership, should be considered as falling within the classification of "membership dues." We are still of this view.

F.2d 228 (1964). In the *Musicians* case, the court held that "membership dues" included a 1.5-percent "tax" on members' salaries. The court reasoned that the tax was "similar to membership dues in that it applied equally to all members of the Union who secured employment." 340 F.2d at 234. The fact that payment was contingent upon employment did not disqualify the "tax" from being treated as "membership dues." Id.

Like the "tax" considered by the court in the *Musicians* case, we find that the Union's permit fee is "similar" to "membership dues." For one thing, the monthly permit fee is equal in amount to the monthly dues the Union charges its members. In addition, it is well established that "membership dues" encompasses an "initiation fee," *Wolf*, supra, and the permit fee resembles such a fee because it represents an amount the employee must pay the Union prior to becoming a member.[29] Finally, although the Respondent points out that the permit fees are paid by probationary employees who, under the terms of the collective-bargaining agreement, may be terminated during their probationary period with or without just cause, there is no contention that the probationary employees are not part of the bargaining unit or that they are not otherwise covered by the agreement. Therefore, the permit fee can reasonably be viewed as a charge to finance the cost of representing the probationary employees, just as the Union charges dues to finance the cost of representing the regular employees. Accordingly, for all of the above reasons, we conclude that the Union's "permit fees" fall within the classification of "membership dues," as that statutory term has been broadly defined.

In sum, the record shows, and we find, that employees voluntarily signed a form authorizing the Respondent to deduct from their pay and remit to the Union "an amount equal to the . . . dues established by the Union," that a "permit fee" represents such an amount, that the Respondent had an established practice of honoring such authorizations, which became an implied term of the parties' collective-bargaining agreement, and that "membership dues" as used in Section 302(c)(4) is broad enough to encompass the Union's "permit fees." Accordingly, we conclude that the Respondent violated Section 8(a)(5) and (1) of the Act when, during the term of the contract, it ceased deducting and remitting permit fees without obtaining the Union's consent.

[29] See *Oklahoma Fixture Co*., 305 NLRB 1077, 1078 (1992), describing the Union's "dues and permit structure." As the Respondent notes, the union-security clause does not require payment of permit fees as a condition of employment. However, the 302(c)(4) exception for payment of "membership dues" is not limited to dues that are required to be paid pursuant to a union-security clause. Thus, this fact has no bearing on the question of whether the permit fees fall within the membership dues exception.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Oklahoma Fixture Company, Tulsa, Oklahoma, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with United Brotherhood of Carpenters and Joiners of America, Local Union No. 943, AFL–CIO as collective-bargaining representative of its employees in the below described collective-bargaining unit, by unilaterally changing terms and conditions of employment by ceasing to deduct permit fees from employees and remitting those fees authorized by the respective employees to the Union:

> All employees of the Respondent performing carpentry and wood working functions at the Respondent's facility located at 2900 East Apache, Tulsa, Oklahoma, which employees customarily and regularly work on the fixtures manufactured by the Respondent at its facility located at 2900 East Apache, Tulsa, Oklahoma, but excluding all office clerical employees, professional employees, supervisors, guards, and any employees who apply any finish, including paint, to any and all fixtures manufactured by the Respondent.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Resume its practice of deducting permit fees from 30 to 90 employees on authorization by each respective employee, and remitting those funds to the Union as exclusive bargaining representative of the employees in the inside unit described above.

(b) Reimburse the Union for the permit fees the Respondent unlawfully failed to deduct and remit, with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its place of business in Tulsa, Oklahoma, copies of the attached notice marked "Appendix."[30] Copies of the notice, on forms provided by the Regional Director for

[30] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Region 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 1, 1997.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

MEMBER LIEBMAN, dissenting in part.

This case involves regressive bargaining during negotiations for a successor collective-bargaining agreement covering the "outside" bargaining unit of employees.[1] In my view, substantial evidence establishes that the Respondent's regressive final offer was designed to frustrate the possibility of arriving at an agreement with the Union. The Board is authorized to protect the process by which employers and unions may reach agreement,[2] and in so doing it has "wide latitude to monitor the bargaining process."[3] I would exercise that authority in this case "to order the cessation of behavior which . . . reflects a cast of mind against reaching agreement."[4] Therefore, contrary to my colleagues and in agreement with the judge, I would find that the Respondent failed to bargain in good faith in violation of Section 8(a)(5) and (1) of the Act.

I emphasize at the outset that my disagreement with the majority is primarily factual and centers on two key points. First, the record does not support the majority's finding that the Respondent adequately supplied an explanation for the changes in its final offer. Second, the record clearly establishes, contrary to the majority's finding, that although the parties were not at impasse, the Respondent was unwilling to meet with the Union for further negotiations after the Respondent presented its final offer.

[1] I join my colleagues in finding that the Respondent violated Sec. 8(a)(5) and (1) of the Act by ceasing to deduct permit fees from employees' pay and by ceasing to remit those sums to the Union, with respect to the "inside" bargaining unit of employees.

[2] See *Sea Bay Manor Home for Adults,* 253 NLRB 739, 741 (1980), enfd. mem. 685 F.2d 425 (2d Cir. 1982).

[3] *McClatchy Newspapers, v. NLRB,* 131 F.3d 1026, 1031 (D.C. Cir. 1997), citing *Charles D. Bonanno Linen Service v. NLRB,* 454 U.S. 404 (1982).

[4] *NLRB v. Katz,* 369 U.S. 736 (1962).

Factual Background

Specifically, in its final offer, the Respondent changed its position with respect to the following three significant topics:

(1) Union Access to Jobsites. The Union's initial contract proposal presented on August 15, 1995, provided that "[a]uthorized business representatives shall have access to the projects provided they notify the field superintendent." The Respondent's counterproposal of September 28, 1995, contained precisely the same provision. The Respondent's subsequent counterproposal of February 7, 1996, likewise included the access provision, and the record establishes that the Respondent never raised any concern regarding that issue. Nonetheless, the Respondent's final contract proposal of July 19, 1996, deleted the access provision. The Respondent never provided any explanation to the Union for doing so.

(2) Union Security. The Union's initial contract proposal included a union-security provision. The Respondent's initial proposal did not include a union-security provision, but its February 7, 1996 counterproposal did. The Respondent deleted the union-security proposal from its final offer, however, and provided no explanation to the Union for doing so.

(3) Use of the Union's Hiring Hall. The Union's initial proposal retained the provision from the previous contract that the Respondent must initially seek to obtain employees from the Union's hiring hall, but is free to hire from any source if the Union is unable to provide workers within 24 hours of the request. The Respondent's counterproposal of September 28, 1995 proposed elimination of the hiring hall requirement. The parties thereafter discussed staffing needs. The Respondent stated that it felt the hiring hall could not fully satisfy its anticipated personnel requirements.

The Union, on December 12, 1995, accordingly proposed that the Respondent could, at its discretion, staff up to 40 percent of any job's work force without utilizing the hiring hall. (The Union retained the provision additionally allowing the Respondent to hire from any source if the Union failed to furnish requested employees within 24 hours.) The Respondent, on February 7, 1996, proposed that, at its discretion, it could staff each of its jobsites with up to 70 percent of the work force hired outside the union hiring hall.

On March 5, 1996, the parties met with a mediator from the Federal Mediation and Conciliation Service. The session focused on the Respondent's concerns with the Union's hiring hall. The Respondent stated that it would accept the Union's original contract proposal in its entirety if the Union would exclude from the hiring hall requirement any work performed within its jurisdiction

by the Respondent for Dillards' department stores. The Respondent stated that Dillards would not permit work to be performed under a union contract. On March 13, 1996, the Union filed an unfair labor practice charge with respect to the proposed exclusion of the Dillards' work. The Respondent thereafter dropped its demand regarding the Dillards' work and on May 28, 1996, the Board's Regional Office approved the Union's request to withdraw the unfair labor practice charge. By letter dated May 28, 1996, the Respondent informed the Union that it was withdrawing its previous contract offer.

About May 28, 1996, the parties resumed negotiations. The Respondent expressed its concern regarding the Union's ability to satisfy the Respondent's staffing needs for large projects. The Union orally proposed that the parties meet in a prejob conference to discuss the Respondent's anticipated need for workers for each project involving more than 10 employees. Within 48 hours of the meeting, the Union would advise how many workers it could refer to the job and, if that number was less than the anticipated needs, the Respondent would be free to hire from any source. The Respondent's counsel stated that the oral proposal "was interesting and he would like to see some language on that." The record does not show that the Respondent expressed any concern on any other bargaining topic. The Union, as requested, submitted its prejob conference proposal in writing to the Respondent on May 31, 1996.

The judge found that despite requests from the Union the Respondent did not thereafter reply to the Union's proposal for approximately 6 weeks. On July 19, 1996, the Respondent submitted its final proposal, which eliminated the hiring hall, the union-security, and access provisions. The Respondent made no mention of the prejob conference proposal, which it had asked the Union to reduce to writing, and indeed made no reference to any provision other than the hiring hall. The Respondent's cover letter to its final proposal stated:

> The main area of concern continues to be the source of labor. Just because the Union has a hiring hall, the company is not willing to continue to use it as its sole source.

On July 23, 1996, union counsel telephoned the Respondent's counsel and stated that the Respondent's final proposal was a "complete departure" from the parties' negotiations, and asked whether there would be any benefit in having another meeting. The Respondent's counsel replied that he did not think so. Two days later, the Union filed the instant unfair labor practice charge.

Discussion

Section 8(d) of the Act defines the duty to bargain collectively as "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession." Good-faith bargaining "presupposes a desire to reach ultimate agreement, to enter into a collective bargaining contract." *NLRB v. Insurance Agents*, 361 U.S. 477, 485 (1960).

It is necessary to scrutinize a party's overall conduct to determine whether it has bargained in good faith. See, e.g., *Atlanta Hilton & Tower,* 271 NLRB 1600, 1603 (1984). Further, although the Board does not evaluate whether particular proposals are acceptable or unacceptable, the Board will "examine proposals when appropriate and consider whether, on the basis of objective factors, a demand is clearly designed to frustrate agreement on a collective-bargaining contract." *Reichhold Chemicals*, 288 NLRB 69 (1988), affd. in relevant part 906 F.2d 719 (D.C. Cir. 1990), cert. denied 498 U.S. 1053 (1991).

As recently summarized by the District of Columbia Circuit, "the key issue in evaluating the propriety of regressive bargaining is whether it is designed to 'frustrate the bargaining process'. . . . [This principle] is the predominant theme in the Board's regressive bargaining decisions." *Graphic Communications Local 458-3M v. NLRB,* 206 F.3d 22, 32 (D.C. Cir. 2000). Thus, it is well established that the withdrawal of a proposal by an employer without good cause is evidence of an intent to frustrate the bargaining process where the proposal has been tentatively agreed on, or when acceptance by the union appears to be imminent. See, e.g., *Mead Corp. v. NLRB*, 697 F.2d 1013, 1021 (11th Cir. 1983); and *Driftwood Convalescent Hospital*, 312 NLRB 247 (1993). Such an intent may also be inferred, even in the absence of tentative agreements or imminent acceptance of proposals by the union, when the employer fails to offer any legitimate explanation or justification for its regressive proposals. See, e.g., *Pacific Grinding Wheel,* 220 NLRB 1389, 1390 (1975), enfd. 572 F.2d 1343 (9th Cir. 1978); *Hyatt Regency Memphis*, 296 NLRB 289, 314 (1989); *Central Management Co.*, 314 NLRB 763, 770–771 (1994); and *O'Malley Lumber Co.,* 234 NLRB 1171, 1179 (1978).

Applying these principles to the facts of this case, I find, contrary to my colleagues, that the Respondent's final proposals, when viewed in the context of the parties' overall bargaining conduct, were designed to frustrate reaching an agreement.

As discussed, the Respondent's July 19, 1996 final offer backtracked on several significant issues. It deleted the union-access provision included in prior proposals as well as the union-security provision included in the February 7, 1996 proposal. No explanation was offered for the Respondent's retreats on these topics. In my view, this conduct is evidence of bad faith.

Furthermore, in its final offer, the Respondent sought to eliminate the hiring hall provision entirely, thus, re-

verting back to the position it had taken in the negotiations approximately 10 months earlier. By way of explanation, the Respondent stated in its covering letter that it was not willing to use the hiring hall as its "sole source" of personnel. The Union, however, was not proposing that the hiring hall be the "sole source." Rather, the Union had proposed that the Respondent could, at its discretion, staff up to 40 percent of any job's work force without utilizing the hiring hall, and the Union had never withdrawn that proposal. Alternatively, the Union had offered its prejob conference proposal under which, if the Union was unable to refer sufficient workers to meet the employer's needs on a particular project, the Respondent would be free to hire additional workers from other sources, without limitation as to numbers. In other words, the parties had advanced far beyond the "sole source" concept, so that by asserting this quite inaccurate explanation for its regressive proposal, on what was the key issue in these negotiations, the Respondent cast serious doubt on whether it was bargaining in good faith, with a sincere intent to reach agreement.[5]

The record belies the majority's view that the Respondent's "sole source" explanation was simply a benign expression signifying that the Respondent was intent on securing relief from such a requirement. The Respondent wholly ignored the Union's prejob conference hiring hall proposal, despite the fact that the Respondent had specifically solicited that proposal, deemed it "interesting," and requested it in writing. It made no counterproposal or response whatsoever. Instead, without explanation it abruptly reverted to its position of 10 months earlier, elimination of the hiring hall, and thereby abandoned the parties' ongoing mutual attempts to reach acceptable agreement on the hiring hall issue. Given this conduct, the majority's view, that the Respondent returned to its original proposals only after "its attempts at reaching an acceptable agreement regarding the hiring hall [were] unsuccessful,"[6] is totally at odds with the facts.

Significantly, when the Union objected to the Respondent's final offer as a "complete departure" from the parties' negotiations and asked about an additional meeting, the Respondent replied that there would be no benefit in having another meeting. It, however, made no claim that the parties were at impasse. Accordingly, the duty to meet and bargain continued. In my view, the Respondent's unwillingness to meet and discuss the regressive proposals it had just made is strong evidence of a cast of mind, not to reach, but rather to avoid reaching agreement.[7]

Finally, as the judge found, the Union did nothing to justify the regressive approach. It consistently made offers that addressed the Respondent's concerns and demonstrated willingness to compromise. Accordingly, under all of the circumstances, I can only conclude that the Respondent's final offer of July 19, 1996, was intended to frustrate the possibility of arriving at any agreement.

Contrary to the implications in the majority opinion, my conclusion that the Respondent failed to bargain in good faith is *not* premised on the "harsh" content of the Respondent's final proposal.[8] I have examined the specific proposals, not to assess their reasonableness, but simply to determine that in fact they were dramatically regressive. I have looked, not just at the proposals themselves, but rather the entire bargaining process leading up to and including the abrupt and unexplained retreat in the July 19, 1996 final proposal. I have considered whether, on the basis of objective factors, the final offer was clearly designed to frustrate agreement. See *Reichhold Chemicals,* 288 NLRB at 69. Based on this review, I cannot join my colleagues' characterization of the Respondent's conduct as lawful hard bargaining, or an adamant refusal to recede from an announced position advanced and maintained in good faith. This is rather a case in which, after almost a year of negotiations, the Respondent regressed in several significant respects in its bargaining proposals, utterly failed to explain those changes to the Union, and rebuffed the Union's effort to obtain a further meeting.

For all these reasons, I would adopt the judge's conclusion that the Respondent bargained in bad faith in violation of Section 8(a)(5) and (1) of the Act.

[5] The Respondent argues in its exceptions that the Union "insisted" upon its prejob conference proposal that "would require [the Respondent] to look first to the hiring hall for employees." The record establishes that the Union did not insist on this proposal, but rather submitted it in writing upon the request of the Respondent.

[6] There is no evidentiary support for the majority's finding that the Respondent justified its return to its earlier bargaining positions in order to "emphasize its resolve concerning the hiring hall issue" and to "refocus the negotiations on that matter so that an agreement would ultimately be possible." Upon introduction of its final offer, the Respondent never expressed such a sentiment to the Union, verbally, in writing, in negotiations, or otherwise.

[7] The Union's attorney testified that after receiving the Respondent's final offer he asked the Respondent's attorney whether "would there be any benefit in having another meeting. He said he didn't think so" and that the Respondent's attorney "saw no basis for further discussion." Contrary to the view of the majority, this testimony fully supports a finding that the Respondent was unwilling to meet further and that a formal union request for such a meeting would be futile. It is well established that a respondent's unwillingness to meet with the union is indicative of a lack of good faith. See *Sparks Nugget v. NLRB*, 968 F.2d 991, 995 (9th Cir. 1992). The majority's observation that the complaint does not allege that "this exchange" constituted an unfair labor practices is irrelevant. The theory of the complaint is that, "[b]y its overall conduct," the Respondent bargained in bad faith, and there is no requirement that a complaint specifically list each and every indicia of bad faith. In any event, the unwillingness-to-meet issue was fully litigated at the hearing.

[8] In agreeing with the judge that the Respondent failed to bargain in good faith, I do not adopt his rationale that the Respondent was attempting to terminate its bargaining obligation by dissipating the Union's strength.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to bargain with United Brotherhood of Carpenters and Joiners of America, Local Union No. 943, AFL–CIO as collective-bargaining representative of our employees in the below described collective-bargaining unit, by unilaterally changing terms and conditions of employment by ceasing to deduct permit fees from employees and remitting those fees authorized by the respective employees to the Union:

> All employees of ours performing carpentry and wood working functions at our facility located at 2900 East Apache, Tulsa, Oklahoma, which employees customarily and regularly work on the fixtures manufactured by us at our facility located at 2900 East Apache, Tulsa, Oklahoma, but excluding all office clerical employees, professional employees, supervisors, guards, and any employees who apply any finish, including paint, to any and all fixtures manufactured by us.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of rights guaranteed you by Section 7 of the Act.

WE WILL resume our practice of deducting permit fees from 30- to 90-day employees upon authorization by each respective employee, and remitting those funds to the Union as exclusive bargaining representative of the employees in the inside unit described above.

WE WILL reimburse the Union for the permit fees we unlawfully failed to deduct and remit, with interest.

OKLAHOMA FIXTURE COMPANY

Francis A. Molenda, Esq., for the General Counsel.

Stephen L. Andrew, Esq., of Tulsa, Oklahoma, for the Respondent.

Thomas F. Birmingham, Esq., of Tulsa, Oklahoma, for the Charging Party.

DECISION

PARGEN ROBERTSON, Administrative Law Judge. This matter was heard in Tulsa, Oklahoma, on June 2, 1997. The charge in Case 17–CA–18734 was filed on July 25, 1996. The charge in Case 17–CA–19036 was filed on February 24, 1997. A consolidated complaint issued on April 11, 1997.

The Respondent, the Charging Party (the Union), and the General Counsel were represented and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. The Respondent, the Charging Party, and the General Counsel filed briefs. On consideration of the entire record and briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent admitted that at material times it has been a corporation with a place of business in Tulsa, Oklahoma, where it has been engaged in the manufacturing, remodeling, and installation of store fixtures; that during the 12 months ending March 31, 1997, in conducting those business operations, it performed services valued in excess of $50,000 in States other than Oklahoma and it purchased and received goods and materials valued in excess of $50,000 directly from points outside Oklahoma; and that it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the National Labor Relations Act (Act).

II. LABOR ORGANIZATION

Respondent admitted that the Charging Party (Union) has been a labor organization at material times within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICE ALLEGATIONS

A. Case 17–CA–18734

(a) The General Counsel argued that Respondent illegally offered a final proposal to the Union during negotiations for its outside bargaining unit, which was onerous and calculated to frustrated the Union as to constitute bad-faith bargaining.

Respondent and the Union have a collective-bargaining history going back to the 1930s. The Union has represented approximately 500 inside production employees and in a separate bargaining unit, the outside installing portion of the Company (outside unit). Until the 1980s those contracts were contained in one document. Since then they have become separate contracts with separate expiration dates. The General Counsel's Exhibit 2 is a collective-bargaining agreement in effect from February 26, 1993, through May 31, 1995, for the outside unit. That unit is described as:

> All employees engaged in field manufacturing, remodeling and installation of fixtures and cabinetry, employed by the Respondent in counties within the geographical jurisdiction of the Union, which is Tulsa, Creek, Craig, Delaware, Muskogee, Wagoner, Adair, Cherokee, McIntosh, Okmulgee, Okfuskee, Mayes, Rogers, Pittsburg, Latimer, LeFlore counties, that part of Osage County south of State Highway 20, including all of the town of Hominy, and that part of Pawnee County east of State Highway 99, and parts of Haskell and Sequoyah Counties, and the north one-third (1/3) of Pushmataha County, the north one-half (1/2) of Atoka County, and the east one-half (1/2) of Coal County, and the eastern two-thirds (2/3) of Osage County, but ex-

cluding plant production and maintenance employees, office clerical employees, professional employees, drivers, guards and supervisors as defined in the Act, and all other employees.

Respondent wrote the Union on January 13, 1995, with notice that it was terminating the collective-bargaining agreement set to expire on May 31, 1995. On January 20, the Union advised Respondent that it wished to reopen negotiations for a collective-bargaining agreement. The parties eventually agreed to meet for negotiations on August 15, 1995. The Union submitted a contract proposal. The parties met again on September 28, 1995. Respondent submitted a counterproposal that included a 19-percent wage reduction and elimination of health and welfare, pension and apprenticeship fund benefits. Respondent's proposal eliminated the hiring hall provision, which had been included in prior contracts. It provided for a 1-year contract instead of 3 years.

By an October 4, 1995 letter, the Union submitted another proposal. Their proposal included a 4.5-percent pay increase in the first year; 2.7-percent pay increase in the second year, and a 3-percent pay increase in the third year of the contract. The union proposal provided Respondent economic relief by providing a change in the ratio of the journeymen and foremen.

On November 10 Respondent answered the Union's proposal. Respondent agreed to the proposed wage increase provided Respondent is allowed to staff any and all its projects with its own employees. Respondent stated that it felt the Union could not man its upcoming jobs in the Tulsa area. Previously, under the expired contract, Respondent could man its jobs from any source if the Union failed to provide requested manpower within 24 hours. The expired contract provided that any nonunion craftsman hired by Respondent would become a union member if his employment exceeded 7 working days.

On December 12, 1995, the Union submitted another counterproposal. In addition to its past proposal allowing Respondent to man any job if the Union failed to furnish requested employees within 24 hours, the proposal provided that Respondent could at its discretion staff up to 40 percent of any job's work force without going through the Union's hiring hall.

The Union did not receive a response from Respondent. On January 26, 1996, the Union wrote Respondent asking to discuss the outside contract.

Respondent submitted a counterproposal on February 7, 1996. Respondent proposed that it could staff up to 70 percent of any job's work force. It agreed to the Union's proposed wage increases and to the old health, welfare, and pension benefits.

On February 18, the Union faxed a request to meet and discuss Respondent's February 7 counterproposal.

The parties met on March 5, 1996. Respondent proposed that it would accept the Union's August 15, 1995 proposal provided the Union agree to exclude all work Respondent performed for Dillards' department stores. Respondent expressed fear that the Union could not man the Dillards' jobs.

Respondent's spokesperson stated that Dillards had said that they were not going to allow any fixture company to do any installation work under a union contract.

The Union felt that the Dillards' work constituted a substantial portion of Respondent's work. According to testimony of Tom Birmingham, a stipulation in the record of an ongoing Board hearing, showed that Respondent did $55 million of work in 1995 and that $45 million of that work was for Dillards.

Around March 11 the parties discussed the negotiations during a phone conference call. Respondent had not changed their position of agreeing to a contract that excluded all Dillards' work and the Union was unwilling to agree to that proposal. The Union filed an unfair labor practice charge 2 days later. The Union understood that Respondent was willing to drop its demand that the Dillards' work be excluded from the contract and it withdrew the unfair labor practice charge.

On May 28, 1996, the parties met. The Union made another counterproposal. The proposal involved a change in the hiring hall provisions of the contract for all Respondent's jobs that involved more than 10 employees. The Union proposed holding conferences before the beginning of each respective job. During the conference Respondent would inform the Union of the demands for manning the upcoming job. Within 48 hours the Union would declare whether it could man that job and it would provide Respondent with a list of employees. If the Union failed to provide sufficient employees then Respondent could hire the remaining employees from any source. At Respondent's request the Union submitted its proposal in writing on May 31, 1996.

Despite requests from the Union the Respondent did not reply to the Union's proposal until July 11, 1996. At that time Respondent notified the Union that it would meet the Union. However, there was confusion as to the meeting date and the parties did not meet around that time.

On July 19, 1996, Respondent submitted a counterproposal. The proposal was for a 1-year contract from May 31, 1996. Article III provided that Respondent may use the Union's hiring hall at Respondent's discretion. Respondent removed a provision in the August 15, 1995 contract proposal providing access to each job for the union business representative and Respondent eliminated the union-security provisions.

On July 23 the Union asked Respondent if an additional meeting would be beneficial and Respondent indicated it did not think so. The parties have not engaged in further negotiations.

Respondent President Ronnie Line testified that it expected to perform installation work during two Dillards' stores renovation in Tulsa in 1995. Each of those two jobs would require approximately 100 carpenters. Additionally Respondent anticipated a number of other jobs from various customers during 1995. Respondent was concerned the Union could not provide sufficient manpower for those two jobs in part because of the Union's history of having difficulty supplying sufficient manpower for Respondent's inside bargaining unit.

Respondent President Line testified that Respondent has always reached agreement with the Union and it had no intention of preventing the reaching of a collective-bargaining agreement. Line testified that the Union had been unable to man some of its jobs 3 or 4 years back.

Ray Hatten, Respondent's human resource director, testified that he has requested 30 employees from the Union during the last several months to fill positions in the inside bargaining unit. The Union was able to provide only two names and neither of those two actually showed up at the job. Hatten agreed that the contract governing those employees is different from the contract for the outside unit, which is relevant to this issue.

Findings

Credibility

The parties do not dispute the evidence regarding contract negotiations.

Conclusions

The General Counsel argued that Respondent's negotiations demonstrate an intent not to reach an agreement with the Union and that where, as here, an employer's conduct is calculated to weaken the union rather than reach agreement the employer is engaged in unlawful bargaining.

Respondent argued that the difference between bad-faith and hard bargaining can only be inferred from the totality of the conduct.

Respondent's initial counterproposal was made on September 28, 1995. Respondent proposed, among other things, elimination of the hiring hall. On November 10, 1995, in its second counterproposal, Respondent proposed that it be allowed to staff its projects with employees of its own choosing. On February 7, 1996, Respondent submitted a proposal that it could staff 70 percent of any job's work force. On March 5, 1996, Respondent proposed that it could fully man all Dillards' jobs. The evidence showed that Dillards may constitute over 80 percent of Respondent's total outside work.

On July 19, 1996, Respondent proposed that it may use the hiring hall at its discretion. Respondent suggested that an additional meeting after July 19 would not be helpful.

The Union submitted contract proposals on August 15, October 4, and December 12, 1995, and on May 28, 1996. On February 7, 1996, Respondent agreed that it would accept the Union's August 15, 1995 proposals if the Union agreed to permit Respondent to man up to 70 percent of all jobs' work forces. That proposal tended to show that the Union's August 15 proposal was not unreasonable.

The Union's October 4, 1995 proposal included an effort at compromise. The Union proposed that Respondent could double the ratio of journeymen to foremen on its jobs. That proposal would provide Respondent with economic relief.

The Respondent expressed concern on November 10 as to whether the Union could man all its jobs. On December 12, 1995, the Union addressed Respondent's expressed concern. The Union proposed that Respondent could staff up to 40 percent of any job's work force.

On May 28, 1996, the Union made another effort to address Respondent's expression of fear that the Union could not man all its jobs. The Union proposed a prejob conference within 48 hours of which it would supply Respondent with the names of all referred employees to the job. Respondent could thereafter complete staffing on the job from any source.

The Union continuously offered compromise proposals in an effort to satisfy Respondent's expressions of concern. Respondent expressed concern on November 10, 1995, regarding the Union's ability to man its jobs. On December 12, 1995, the Union proposed a way of addressing that fear. On May 28, 1996, the Union made another proposal addressed to Respondent's concern about the Union manning its jobs. Respondent never illustrated a willingness to pursue the Union's counterproposals beyond its counterproposal that it be permitted to staff 70 percent of all its jobs.

Respondent initiated a position in opposition to the Union supplying its employees from the union hiring hall. Respondent showed some flexibility in that position but it never agreed that the Union could supply more than 30 percent of its work force on any job. Then Respondent's final position was a regressive one. That offer called for the total elimination of the hiring hall. It is evidence that Respondent continued to show an unwillingness to permit the Union to provide anything near a majority of any job's work force and finally it removed even the offer enabling the Union to provide some employees absent a request from Respondent.

In its final contract offer on July 19, 1996, Respondent also proposed elimination of union representatives' access to its jobs and elimination of the union-security provisions of the contract.

At the time of the final offer, the Union had demonstrated a willingness to compromise. The Union had consistently made offers that addressed Respondent's expressions of concern. The evidence failed to show that the Union did anything, other than file an unfair labor practice charge in May 1996, which was quickly withdrawn that justified the regressive counter-proposal made by Respondent on July 19, 1996.

The evidence is not in dispute but the Respondent stated on March 5, 1996, that Dillards was unwilling to allow any fixture company to do its installation work under a union contract.

I am convinced that Respondent was "focused more intently on the prospect of a termination of its bargaining obligation through the Union's loss of majority than on successful negotiation of a collective-bargaining contract." *Radisson Plaza Minneapolis*, 307 NLRB 94 (1992). Respondent's actions demonstrate an intent not to reach an agreement with the Union. *Horsehead Resource Development Co.***,** 321 NLRB 1404 (1996); *Bethea Baptist Home*, 310 NLRB 156 (1993); and *Reichhold Chemicals,* 288 NLRB 69, 70 (1988). Respondent consistently insisted on reducing the Union's role in manning its jobs to significantly less than 50 percent and it finally insisted on removing the Union's access to its jobs and removal of the union-security provision.

I find that Respondent violated Section 8(a)(1) and (5) by making a final collective-bargaining contract offer, which was onerous and calculated to frustrate the Union.

B. Case 17–CA–19036:

(b) Respondent unilaterally changed a term and condition of work for employees in its inside bargaining unit.

The second unfair labor practice case involves a different bargaining unit. The inside unit of Respondent's employees is described as:

> All employees of the Respondent performing carpentry and wood working functions at the Respondent's facility located at 2900 East Apache, Tulsa, Oklahoma, which employees customarily and regularly work on the fixtures manufactured by the Respondent at its facility located at 2900 East Apache, Tulsa, Oklahoma, but excluding all office clerical employees, professional employees, supervisors, guards and any employees who apply any finish, including paint, to any and all fixtures manufactured by the Respondent.

From 1989 until February 1997, Respondent has deducted from employees' pay and remitted to the Union permit fees for those employed for 30 days who had signed authorization for the deductions. The collective-bargaining agreement provided for a 90-day probation period. Employees become eligible to join the Union after their probationary period. In February 1997, Respondent unilaterally, without notice to the Union,

ceased deducting and remitting permit fees to the Union for employees employed over 30 days but less than 91 days. Respondent made that change on advise of counsel that to continue making the deductions and payments to the Union would subject the Respondent to charges for violation of Section 302 of the Act. (See GC Exhs. 29, 30, and 31.)

Findings

Credibility

Again there is no dispute as to the facts.

Conclusions

The General Counsel argued that permit fees deducted from paychecks of unit employees after 30 days of employment constitutes a mandatory subject of bargaining. And that by establishing a practice of deducting those fees from 30-day employees since 1989 Respondent and the Union modified the 90-day security provision of their collective-bargaining contract. Respondent by unilaterally stopping those deductions breached its duty to bargain.

It is not disputed that the 30- to 90-day probationary employees did execute authorizations for the Respondent to withhold permit fees. It is also not disputed that none of those probationary employees were union members.

Respondent and the Union were both well aware that permit fees involved employees that were not union members. See *Oklahoma Fixture Co.*, 305 NLRB 1077 (1992).

The parties followed a dues and permit structure provided on the Union's letterhead shown as effective July 1990 and subsequently effective on January 1, 1997 (GC Exh. 29), stating that Respondent was to deduct permit fees during the second and third month of employment. The collective-bargaining agreement provided that employees become eligible for union membership on the 91st day of employment.

Respondent followed the practice of deducting permit fees from 30- to 90-day probationary employees in agreement with the Union from 1989 until February 1997. I find on basis of the full record that the parties did agree to modify the collective-bargaining agreement by their actions regarding the permit fees for probationary employees. *Riverside Cement Co.*, 296 NLRB 840, 841 (1989), as cited in *Smiths Industries*, 316 NLRB 376 (1995).

Respondent argued that the permit fees do not constitute membership dues under Section 302 of the Act. It argued that the language of the collective-bargaining agreement union security clause demonstrates that employees are not required to elect whether to become union members until the 91st day of their employment. Permit fees were withheld from probationary employees employed 30 or more days but not exceeding 90 days. Therefore the permit fees may not be considered union dues but are fees charged to nonmembers of the Union for the privilege of working. Respondent contends that it would violate Section 302 of the Act by continuing to withhold permit fees from probationary, nonunion, and employees' pay.

Section 302 of the Act provides that an employer may not make payment of funds to a labor organization except, among other things, "money deducted from the wages of employees in payment of membership dues" provided the respective employee authorizes that deduction in writing.

However, the Board has recognized that an employer may deduct fees from employees that are not union members and remit those funds to the union. See for example *Rochester Mfg. Co.,* 323 NLRB 260 (1997); and *California Saw & Knife Works*, 320 NLRB 224 (1995). Here, the litigation did not extend to the question of whether Respondent and the Union advised the nonmember employees of their rights under *Communications Workers v. Beck*, 487 U.S. 735 (1988); and *NLRB v. General Motors*, 373 U.S. 734 (1963).

It is well established that negotiations regarding probationary employees is a mandatory subject of bargaining. *Bethea Baptist Home,* 310 NLRB 156 (1993); *Asociacion Hospital del Maestro,* 317 NLRB 485 (1995); and *Comcraft, Inc.,* 317 NLRB 550 (1995).

Respondent cited *Mine Workers Local 515 v. American Smelting Co.*, 311 F.2d 656 (9th Cir. 1963). However, the court there determined that it must look to the parties intent in determining the meaning of membership dues. Here, it is clear by the actions of Respondent in withholding permit fees from 1989 until 1997, that it and the Union agreed those fees should be withheld upon authorization by the employees.

I find that Respondent engaged in conduct in violation of Section 8(a)(1) and (5) by unilaterally ceasing the deduction and remission to the Union of permit fees.

CONCLUSIONS OF LAW

1. Oklahoma Fixture Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. United Brotherhood of Carpenters and Joiners of America, Local Union No. 943, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent, by making a final collective-bargaining contract offer in the below described collective-bargaining unit that is onerous and calculated to frustrate the Union, has engaged in bad-faith bargaining violative of Section 8(a)(1) and (5) of the Act.

> All employees engaged in field manufacturing, remodeling and installation of fixtures and cabinetry, employed by the Respondent in counties within the geographical jurisdiction of the Union, which is Tulsa, Creek, Craig, Delaware, Muskogee, Wagoner, Adair, Cherokee, McIntosh, Okmulgee, Okfuskee, Mayes, Rogers, Pittsburg, Latimer, LeFlore counties, that part of Osage County south of State Highway 20, including all of the town of Hominy, and that part of Pawnee County east of State Highway 99, and parts of Haskell and Sequoyah Counties, and the north one-third (1/3) of Pushmataha County, the north one-half (1/2) of Atoka County, and the east one-half (1/2) of Coal County, and the eastern two-thirds (2/3) of Osage County, but excluding plant production and maintenance employees, office clerical employees, professional employees, drivers, guards and supervisors as defined in the Act, and all other employees.

4. Respondent by unilaterally changing terms and conditions of employment in the below described collective-bargaining unit, by ceasing to continue deducting permit fees and remitting those funds to the Union; has engaged in conduct violative of Section 8(a)(1) and (5) of the Act:

> All employees of the Respondent performing carpentry and wood working functions at the Respondent's facility located at 2900 East Apache, Tulsa, Oklahoma, which employees customarily and regularly work on the fixtures manufactured by the Respondent at its facility located at 2900 East Apache, Tulsa, Oklahoma, but excluding all office clerical employees, professional employees, supervisors, guards and

any employees who apply any finish, including paint, to any and all fixtures manufactured by the Respondent.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

REMEDY

Having found that Respondent has engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action necessary to effectuate the policies of the Act.

Having found that the Respondent has refused to bargain in good faith with the Union, I shall recommend that it, upon request, bargain collectively in good faith with the Union as the representative of its employees in the outside unit and in the event that an agreement is reached, to embody such understanding in a written agreement, but, in any event, to negotiate in good faith for a reasonable time from the commencement of such negotiations. This reasonable time shall start at the time negotiations begin again. Having found that Respondent unilaterally ceased deducting and remitting permit fees to the Union, I shall recommend that it immediately reinstate that practice.

[Recommended Order omitted from publication.]